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KANSAS AND MISSOURI**



**Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001**

**Re: STB Docket No. AB-1053 (Sub-No. 1X),
Michigan Air-Line Railway Co.-
Abandonment Exemption-Line in Oakland County, Michigan**

Dear Ms. Brown:

229689

Enclosed for filing in your office is the original and ten copies of a Response to STB's Decision of May 18, 2011.

In addition, I have enclosed an extra copy of the Response, and I request that you date-stamp this copy and return it to me in the self-addressed, stamped envelope I have enclosed.

Thank you for your assistance in this matter. If there are any questions concerning this filing, please contact me by telephone at (785) 232-0753 or by email at the email address shown above.

Very truly yours,

**W. Robert Alderson
ALDERSON, ALDERSON, WEILER,
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**WRA:bjb
Enclosures**

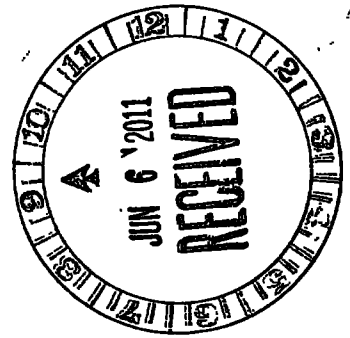
**cc: R. Robert Butler
Dirk H. Beckwith, Esq.**

**ENTERED
Office of Proceedings**

JUN 03 2011

**Part of
Public Record**

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC



STB DOCKET NO. AB-1053 (Sub-No. 1X)

229689
MICHIGAN AIR-LINE RAILWAY CO.
- ABANDONMENT EXEMPTION -
LINE IN OAKLAND COUNTY, MICHIGAN

RESPONSE TO STB'S DECISION OF MAY 18, 2011

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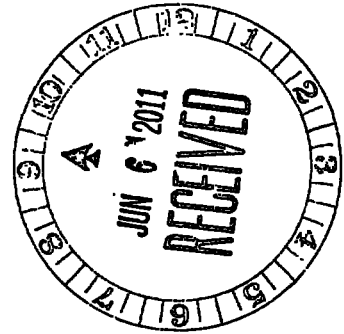
Dated: June 3, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB DOCKET NO. AB-1053 (Sub-No. 1X)

**MICHIGAN AIR-LINE RAILWAY CO.
- ABANDONMENT EXEMPTION -
LINE IN OAKLAND COUNTY, MICHIGAN**

RESPONSE TO STB'S DECISION OF MAY 18, 2011



COMES NOW Michigan Air-Line Railway Co. ("MAL Railway") and as directed by order of the Surface Transportation Board ("Board" or "STB") contained in the Board's decision issued in this docket on May 18, 2011 ("May 18th Decision"), provides a response ("Response") to the Board's order to provide to the Board, no later than June 7, 2011, the contract between MAL Railway and Rail Freight Solutions, Inc. ("RFS") and any other documentation showing their relationship, and to show cause why the Board should not find that RFS is operating in violation of 49 U.S.C. § 10902.

I. BACKGROUND

On January 28, 2011, MAL Railway filed with the STB a Petition for Exemption, pursuant to 49 U.S.C. § 10502, seeking exemption from the prior approval requirements of 49 U.S.C. § 10903 to abandon approximately 5.45 miles of rail line ("Rail Line") in Oakland County, Michigan. Notice thereof was published in the *Federal Register* on February 17, 2011 (76 Fed. Reg. 9,402-03).

On March 9, 2011, American Plastic Toys, Inc. ("APT"), the sole shipper on the Rail Line filed a Reply and Objection to Petition for Exemption ("Reply"), opposing MAL Railway's Petition for Exemption.

On March 16, 2011, Nevada Central Railroad ("NCR") filed its Notice of Intent to File an Offer of Financial Assistance.

On March 29, 2011, MAL Railway filed a Petition for Leave to File a Surreply and the Surreply.

On April 19, 2011, APT filed its Notice of Intent to File an Offer of Financial Assistance.

On April 22, 2011, NCR filed a Notice to Withdraw its Notice of Intent to File an OFA.

By its May 18th Decision, the Board:

- ◆ Denied MAL Railway's Petition for Exemption;
- ◆ Granted MAL Railway's Petition for Leave to file a Surreply and admitted MAL Railway's Surreply;
- ◆ Permitted NCR to withdraw its Notice of Intent to File an OFA;
- ◆ Denied APT's Notice of Intent to File an OFA as being moot;
- ◆ Directed MAL Railway to serve copies of the May 18th Decision on RFS and APT, so that they were received by those parties within five days after the service date of the May 18th Decision and to certify contemporaneously to the Board that it has done so; and
- ◆ Ordered a response by MAL Railway and RFS to the Board's questions as to their relationship and whether there has been a violation of 49 U.S.C. § 10902.

On May 23, 2011, legal counsel for MAL Railway mailed to Cynthia T. Brown, Chief of STB's Section of Administration, Office of Proceedings, a Certificate of Service testifying to the service of the May 18th Decision on APT and RFS on May 20, 2011.

Copies of the letter to Ms. Brown and the Certificate of Service are included in Exhibit B, which is attached hereto.

II. RELATIONSHIP BETWEEN MAL RAILWAY AND RFS

Attached to this Response as Exhibit A is the Verified Statement of R. Robert Butler, the President of MAL Railway. In his Verified Statement, Mr. Butler explains the history of MAL Railway and the acquisition of its stock by Browner Turnout, Co. ("Browner"), a Nebraska corporation controlled by Mr. Butler. He states that on June 2, 2006, Railmark Holdings, Inc. ("Railmark") purchased the stock of Coe Rail, Inc., a Michigan corporation and a Class III rail common carrier, which owned approximately 8.42 miles of rail line ("Line") in Oakland County, Michigan. Mr. Butler further advises that, on June 28, 2006, the name of the railroad was changed from Coe Rail, Inc., to Michigan Air-Line Railway Co.

On November 11, 2009, Mr. Butler indicates that Browner acquired ownership of all issued and outstanding shares of stock of MAL Railway, and as part of that transaction, it was agreed that Railmark would serve as a contract operator to provide rail freight service to APT as MAL Railway's agent. As will be discussed, RFS, a wholly-owned subsidiary of Railmark, has fulfilled that obligation. Since the middle of 2008, APT has been the sole shipper on the Rail Line.

Mr. Butler's Verified Statement details the essential elements of its agreement with RFS which, regrettably, was not reduced to writing. However, by his Affidavit, B. Allen Brown, President and CEO of RFS, has concurred with Mr. Butler's recitation of the essential elements of the agreement between MAL Railway and RFS. With Mr. Brown's consent, his Affidavit has been attached to Mr. Butler's Verified Statement as Exhibit 3, with the intent that the statements in his Affidavit will address the Board's order that he provide an explanation of his agreement with MAL Railway and will provide facts sufficient for the Board to find that RFS has not violated the provisions of 49 U.S.C. § 10902.

By Mr. Butler's Verified Statement and the Affidavit of Mr. Brown, it is clear there is agreement that there have been no representations to the public by either MAL Railway or RFS that RFS is a rail common carrier. There have been no representations that RFS is anything other than a contract operator providing rail freight service to APT as the agent of MAL Railway.

As the Board may recall, attached as Exhibit A to MAL Railway's Surreply, which was admitted by the Board in its May 18th Decision, was an Affidavit of B. Allen Brown, the same person who has given an Affidavit that is attached to Mr. Butler's Verified Statement. Attached to Mr. Brown's first Affidavit were several exhibits. Exhibit Nos. 3 and 4 have relevance here. Those exhibits discuss the proposal made by RFS to provide transloading services to APT as an alternative to the rail freight service provided by RFS as agent for MAL Railway. Pursuing a transloading contract with APT is certainly not characteristic of a company that would hold itself out as a rail common carrier.

Finally, there is a very pertinent consideration not addressed directly by either Mr. Butler or Mr. Brown. From the time the name of Coe Rail, Inc. was changed to Michigan Air-Line Railway Co. in June of 2006, MAL Railway served APT directly and APT was billed for such services on a MAL Railway invoice. After the ownership of MAL Railway changed in November of 2009, and RFS served APT as MAL Railway's agent, APT was billed for rail freight services provided to it on an RFS invoice. From a reading of APT's Reply in this docket, it is clear that APT, as the only member of the shipping public in this situation, was aware that MAL Railway is the rail common carrier and that RFS is the "Service Provider" engaged by MAL Railway to provide rail freight service to APT. There is no apparent belief by APT that RFS is a rail common carrier.

III. COMPLIANCE WITH 49 U.S.C. § 10902

At page 6 of its May 18th Decision, the Board states, as follows:

It appears that RFS may be performing common carrier service and may have held itself out to the public to fulfill a common carrier obligation, in which case it should have first obtained authorization from the board in order to do so. MAL Railway did so in 2006, when it acquired the line from Coe Rail and began service as a common carrier. Mich. Air-Line Ry.- Acquisition and Operation Exemption – Rail Line of Coe Rail, Inc., FD 34902 (STB served July 24, 2006). But it does not appear that RFS or Railmark obtained Board authority to operate the line in place of MAL Railway or to fulfill its common carrier responsibilities, following Browner's 2009 acquisition of MAL Railway.

The Board's decision cited in the foregoing quoted provisions of the May 18th Decision is very puzzling. That prior decision ("MAL Ry. Acquisition/Exemption Decision") reports that MAL Railway, "a noncarrier," filed a verified notice of exemption under 49 CFR § 1150.31 to acquire and operate Coe Rail's rail line in Oakland County, Michigan. That statement presumes that there existed a noncarrier having the name, Michigan Air-Line Railway Co. To the best of MAL Railway's knowledge and belief, that is not a factually correct statement.

The facts, as known by MAL Railway, are as follows: On June 2, 2006, Railmark Holdings, Inc. acquired all of the stock of Coe Rail, Inc., a Michigan corporation and a Class III rail common carrier, which owned a rail line in Oakland County, Michigan of approximately eight miles in length. On June 28, 2006, the records of the Michigan Secretary of State reflect that the name of Coe Rail, Inc. was changed to Michigan Air-Line Railway Co. Also on June 2, 2006, Coe Rail, Inc. entered into a Financing Agreement with The CIT Group, a financial institution in New York, to borrow \$4,200,000. On July 4, 2006, that Financing Agreement was amended to reflect that the name of Coe Rail, Inc. had been changed to Michigan Air-Line Railway Co.

Thus, Michigan Air-Line Railway Co. was not a noncarrier; and it was not an entity separate and distinct from Coe Rail, Inc. Michigan Air-Line Railway Co. was Coe Rail, Inc. with a new name. As such, it owned the rail line in Oakland County and had no need to file a verified notice of exemption to acquire that line. Moreover, as Coe Rail, Inc. with a new name, it had authority as a Class III rail common carrier to serve shippers on the Line and did not need to seek authority to do so pursuant to a notice of exemption.

Accordingly, MAL Railway is at a loss to explain why a verified notice of exemption was filed with the Board to acquire Coe Rail's rail line in Oakland County, Michigan. It was, at best, an unnecessary action, and the verified notice of exemption incorrectly reported that Michigan Air-Line Railway Co. was a noncarrier.

Notwithstanding, it is recognized that the foregoing explanation of facts, as they are known to MAL Railway, do not address the real issue as to why the Board cited the MAL Ry. Acquisition/Exemption Decision in the May 18th Decision. The purpose of that, of course, was to suggest that, if RFS has held itself out to the public as fulfilling a common carrier obligation, it should have obtained authorization from the Board to do so.

The foregoing quoted provision from the MAL Ry. Acquisition/Exemption Decision contained a footnote (fn 7), which included a reference to 49 CFR § 10902 and to 49 CFR § 1150, Subpart E. It also referenced another decision of the Board, *Kan. City Transp. Co. LLC-Lease and Assignment of Lease Exemption – Kan. City Term. Ry. and Kaw River RR, Inc.*, FD. 34830 (STB Served May 23, 2007) (hereinafter referred to as "KCTL Decision").

In the KCTL Decision, the Kansas City Transportation Company (KCTL) acquired the operating and lease rights over 18.2 miles of track in the Kansas City Terminal District. KCTL filed a notice of exemption in which it stated that, although it would likely enter into an agreement with a contract operator, it intended to retain all of its common carrier rights and obligations. The Board responded with a footnote in the notice of exemption that, if KCTL entered into an agreement with a contract operator, the operator must file requests with the Board for operating authority. KCTL entered into an operating agreement with Kaw River Railroad, Inc. (KRR) and requested the Board's deletion of the footnote. KCTL claimed that KRR was only providing a service in KCTL's name as an agent with no independent operating authority. The Board denied the request and asked for a copy of the operating agreement between KCTL and KRR.

The operating agreement contained several liability provisions under which KRR was made the liable party and KCTL was to be indemnified by KRR. In denying KCTL's request to remove the footnote, the Board cited the basic tenet of agency law, that a principal accepts liability for the actions of an agent. The Board held that the operating agreement did not comport with the principles of agency and did not permit a finding that KRR was the agent of KCTL, holding that "[t]he liability assumed by KRR alone demonstrates that it is an entity operating in its own right. As such, KRR requires a license" The Board relied on the fact that KRR had assumed liability, to show that KRR was not merely acting as an agent for KCTL, but was rather acting as a separate entity. The Board concluded that because KRR was acting as a separate entity, and not as an agent of KCTL, it was required to get authority from the Board to operate the line under 49 U.S.C. § 10901.

The situation addressed by the May 18th Decision is distinguishable from the Board's KCTL Decision. There is nothing in the relationship between MAL Railway and RFS that prevents it from being a principal-agent relationship. As noted previously, it is regrettable that the agreement between these parties was not reduced to writing. However, the absence of a written contract and any statements to the contrary by Mr. Butler or Mr. Brown do not present any of the infirmities found in the contract between KCTL and KRR, that prevented KRR from being considered KCTL's agent. Here, through the Verified Statement of R. Robert Butler and the Affidavit of B. Allen Brown, there is agreement that RFS is the agent of MAL Railway in the delivery of inbound traffic to APT. There is nothing in the record that operates to limit that agency relationship. Accordingly, MAL Railway accepts its liability for the actions of RFS when acting within the scope of its authority.

As to the applicability of 49 U.S.C. §§ 10901 and 10902, MAL Railway respectfully submits that neither of these statutes is applicable to RFS. 49 U.S.C. § 10902 applies to Class II and Class III rail carriers and authorizes any such carrier to acquire or operate an extended or additional rail line, with the Board's approval. Here, RFS has not acquired any portion of the

Line, either by purchase, lease or other transfer or conveyance, and MAL Railway has not granted trackage rights to RFS, since RFS is simply providing service on the Line to APT by virtue of being MAL Railway's agent.

Further, it previously has been discussed in this Response that RFS has not held itself out as being a rail carrier and that it has represented to the public only that it acts as a contract operator, an agent of MAL Railway. RFS does not have and it has not asserted that it has operating authority independent of its agreement with MAL Railway. Therefore, RFS has not been operating on the Rail Line to provide service to APT as a rail carrier. For these reasons, 49 U.S.C. § 10902 is not applicable to RFS.

Similarly, as a noncarrier, RFS is not subject to 49 U.S.C. § 10901. Again, RFS has not "acquired" any portion of the Rail Line, and it operates on the Rail Line only as MAL Railway's agent. Such facts dictate that the provisions of 49 U.S.C. § 10901 are not applicable to RFS.

Thus, it is respectfully submitted that the Board should not find that RFS is in violation of either 49 U.S.C. § 10901 or § 10902.

IV. MAL RAILWAY'S FUTURE ACTIONS

In its May 18th Decision, the Board stated that the denial of MAL Railway's Petition for Exemption "is without prejudice to MAL Railway refiling . . . a petition for exemption that cures the defects found in the current proposal, including the lack of participation by RFS as discussed above." That is the course of action MAL Railway intends to pursue, and it anticipates the filing of a petition for exemption (using a new docket subnumber, as directed by the Board) on or before July 1, 2011. In preparation for such filing, MAL Railway has taken or will take the following actions:

- ◆ An appraiser has been engaged to perform an updated appraisal of the Rail Line. It is anticipated that the new appraisal will be completed prior to filing the new petition. A copy of the updated appraisal will be provided to APT, and a CD containing the downloaded appraisal will be submitted to the Board at the time the new petition is filed.

The updated appraisal will serve as the basis for calculating the Rail Line's net liquidation value and opportunity costs in the new petition.

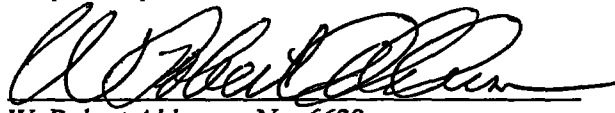
- ◆ MAL Railway has engaged a person qualified to make FRA approved rail line inspections, and on June 1, 2011, the inspector hi-railed the Rail Line and performed the requisite inspection. Once the inspector's recommendations as to needed track repairs, maintenance and rehabilitation are received, bids will be solicited from qualified contractors to determine the cost of such repairs, maintenance and rehabilitation to support the calculation of maintenance and rehabilitation costs in the new petition.
- ◆ Regardless of whether the Board determines that RFS should have obtained authority to operate as MAL Railway's agent in providing service to APT, MAL Railway intends to terminate its relationship with RFS and commence providing rail freight service to APT without the use of a contract operator. In lieu of a contract operator, MAL Railway will employ one or more persons to operate and supervise the operation of the equipment necessary to provide service to APT. It is anticipated this change will occur within a few days after this Response is filed with the Board. Obviously, this change will avoid the concerns expressed by the Board in its May 18th Decision regarding the operations of RFS. More importantly, such change will enable MAL Railway to gain a better understanding of the revenues and expenses involved in serving APT.
- ◆ Also with a view toward being able to present in the next Petition a more detailed statement of the revenues and expenses attributable to the rail freight service provided to APT, Martin Ramsey, MAL Railway's CFO, met with B. Allen Brown, President and CEO of RFS, at the RFS office in Walled Lake, Michigan on May 31 and June 1, 2011. At those meetings, Mr. Ramsey obtained a complete record of the expenses incurred by RFS in providing service to APT during 2010 and to date in 2011, as well as the revenues received in consideration of providing such service.

Accordingly, MAL Railway believes that these measures will enable MAL Railway to cure the defects the Board found in the Petition for Exemption filed by MAL Railway in STB Docket No. AB-1053 (Sub-No. 1X).

V. CONCLUSION

MAL Railway trusts that this Response has adequately addressed the Board's concerns expressed in its May 18th Decision. However, if the Board has further questions, MAL Railway will respond to the Board's request for additional information as soon thereafter as possible.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. Robert Alderson', written over a horizontal line.

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**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB DOCKET NO. AB-1053 (Sub-No. 1X)

**MICHIGAN AIR-LINE RAILWAY CO.
- ABANDONMENT AND DISCONTINUANCE OF SERVICE EXEMPTION -
LINE IN OAKLAND COUNTY, MICHIGAN**

RESPONSE TO STB'S DECISION OF MAY 18, 2011

EXHIBIT A

VERIFIED STATEMENT OF R. ROBERT BUTLER

STB Docket No. AB-1053 (Sub-No. 1X)

Michigan Air-Line Railway Co.
Petition For Exemption – In Oakland County, MI.

Response to STB's Decision of May 18, 2011

VERIFIED STATEMENT OF R. ROBERT BUTLER

My name is R. Robert Butler. I am the President and majority shareholder of RKB Holdings, Inc. ("RKB"), a Kansas corporation, which is the owner of the Michigan Air-Line Railway Co. ("MAL Railway"), and I am, by virtue of such ownership, the President of MAL Railway. My business address is 7160 South 29th Street, Suite 3, Lincoln, Nebraska 68516. Over the last twenty-five years I have been involved in many aspects of railroading, including railcar ownership, track maintenance, construction and consulting. RKB also is the owner of Railroads of Hawaii, Inc., a corporation of Hawaii which is sometimes known as the Lahaina, Kaanapali and Pacific Railroad, which is an excursion/dinner train which operates on the Hawaiian Island of Maui.

In addition to investments in the railroad industry, I am a private equity investor in oil and gas production and am Chairman and majority owner of Frontier Holdings, LLC, a Nebraska bank holding company.

The purpose of my Verified Statement is to discuss the relationship between MAL Railway and Rail Freight Solutions, Inc. ("RFS") a wholly-owned subsidiary of Railmark Holdings, Inc. ("Railmark") for purposes of the Response to STB's Decision of May 18, 2011, to be filed in STB Docket AB-1053 (Sub-No. 1X).

The relationship between Railmark and MAL Railway had its origin in 2006, when Railmark purchased all of the capital stock of Coe Rail, Inc., a Michigan corporation which was duly certificated as a Class III rail common carrier. Coe Rail, Inc., owned approximately 8.42 miles of rail line ("Line") in Oakland County, Michigan. Shortly after Railmark's purchase of Coe Rail, Inc., the name of the railroad was changed to Michigan Air-Line Railway Co. Thereafter, MAL Railway provided service to shippers on the Line. Since the middle of 2008, American Plastic Toys, Inc. ("APT") has been the sole shipper on the Line.

On June 2, 2006, Coe Rail, Inc. borrowed approximately \$4.2 million from The CIT Group Commercial Services, Inc. ("CIT Group") pursuant to a financing agreement ("Financing Agreement"). On July 4, 2006, the Financing Agreement was amended to reflect that the name of Coe Rail, Inc., was changed to Michigan Air-Line Railway Co. In connection with the Financing Agreement, MAL Railway executed promissory notes ("Notes"), provided CIT Group with a mortgage ("Mortgage") on the Line and provided CIT Group with various other financing statements, guarantees and stock pledges (collectively, the "Loan Documents"). In the summer of 2009, I learned the MAL Railway had defaulted on the Loan in 2006, but I also learned that, notwithstanding the collateral provided pursuant to the Mortgage and various Loan Documents, CIT Group had not foreclosed on the Note, Mortgage and the other security instruments. Thus, in the late summer and early fall of 2009, I negotiated an assignment by CIT Group of the Financing Agreement, Notes, Mortgage and other Loan Documents to Browner Turnout Co. ("Browner"), a Nebraska corporation owned solely by my wife, Kim, and me. The assignment was executed as of October 8, 2009.

As part of my due diligence prior to negotiating with CIT Group, I discovered that APT was the sole shipper on the Line, that there had been no rail freight traffic on nearly six miles of the Line for several years and that the various local units of government traversed by the Line (Oakland County Townships of West Bloomfield and Commerce and the cities of Walled Lake and Wixom) were anticipating the abandonment of the Line, thereby creating the possibility that they could acquire the abandoned right-of-way for use as recreational trails.

On October 8, 2009, Railmark and Browner entered into an agreement ("Acquisition Agreement") providing for the transfer and conveyance of all of MAL Railway's issued and outstanding capital stock by Railmark to Browner. A copy of the Acquisition Agreement is attached to this Verified Statement as Exhibit 1. The Acquisition Agreement was amended on October 15, 2009, and a copy of that amendment is attached to this Verified Statement as Exhibit 2. Here, I also should note that Browner subsequently transferred all of MAL Railway's stock to RKB.

Pursuant to the Acquisition Agreement, as amended, MAL Railway released Railmark and its shareholders, B. Allen Brown ("Brown") and Laurence I. Coe ("Coe") from any further liability under the Notes and Mortgage, and MAL Railway paid to Brown and Coe (collectively) a sum in excess of \$200,000.00 and it transferred to Railmark all of MAL Railway's rolling stock and equipment. By a subsequent agreement between Railmark and Coe, Railmark transferred to Coe all of said rolling stock and equipment.

Also pursuant to the amended Acquisition Agreement, MAL Railway, subsequent to Browner's acquisition of MAL Railway's stock, granted Railmark trackage rights on a

segment of the Line on which Railmark could continue its dinner train operations until January 10, 2010, although such operations actually terminated on December 31, 2009. In consideration of MAL Railway granting trackage rights to Railmark for its dinner train, Railmark agreed that its subsidiary, RFS, would operate such rolling stock and equipment as may be necessary and in such manner as is required to satisfy MAL Railway's common carrier obligation to provide rail freight service to APT, until January 8, 2010.

On November 11, 2009, Coe and MAL Railway entered into an agreement, whereby Coe, in consideration of the monies paid and property transferred by Browner to Railmark, for the purpose of acquiring all of the issued and outstanding stock in MAL Railway, agreed to lease to MAL Railway, at no cost, a switch engine ("Switch Engine") suitable for providing rail freight service to APT. Paragraph 3(a) of the Amendment to the Acquisition Agreement provided that Railmark would continue to serve in that capacity until January 8, 2010. For such purpose, MAL Railway authorized Railmark's subsidiary, RFS, to use the Switch Engine to provide rail freight service to APT for and on behalf of MAL Railway.

On January 8, 2010, RFS and MAL Railway verbally renewed their agreement for Railmark to provide rail freight service to APT as MAL Railway's Agent.

Agreement Between RFS and MAL Railway.

The agreement ("Service Agreement") between RFS and MAL Railway, whereby RFS delivers inbound traffic to APT for and on behalf of MAL Railway, consistent with MAL Railway's common carrier obligation, was not reduced to writing. However, there was a clear understanding between the parties that RFS would be a contract operator and

provide service to APT as MAL Railway's agent, essentially in the same manner service had been provided to APT since 2006. The essential elements of the Service Agreement are as follows:

- ◆ Upon notification by APT that railcars have been delivered by CSX and need to be picked up at the CSX interchange and moved to APT's plant, RFS is to respond to such request as promptly as possible. As indicated in the Affidavit of B. Allen Brown, which was attached to MAL Railway's Surreply in this docket as Exhibit A, it is impossible to schedule service to APT. The delivery of cars by CSX in accordance with APT's car orders does not follow a regular pattern. It is not predictable.

Notification of RFS by APT is normally by e-mail. In many instances, the e-mail also requests that empty railcars at APT's plant be returned at the time inbound traffic is picked up. Also, RFS will reposition railcars within APT's facilities on an as needed basis.

- ◆ RFS is responsible for establishing a rate to be charged APT that is sufficient to cover the cost of providing service to APT, when considered in conjunction with the division of revenues received from CSX. The division of revenue per carload delivered by CSX is wire transferred by CSX to MAL Railway's designated bank account. That money is then paid over to RFS, to assist in covering the costs of providing service to APT.

Because scheduled service cannot be provided APT, a per carload rate cannot be structured. RFS has fixed monthly costs that must be covered, so it has been

necessary to charge APT a flat monthly rate sufficient to cover fixed costs, as well as estimated car delivery costs based upon historical monthly car deliveries.

As noted previously, the Switch Engine used by RFS for the movement of railcars to and from APT's plant was provided at no cost to MAL Railway by Coe, and MAL Railway, in turn, provided that Switch Engine to RFS free of charge. In effect, MAL Railway had pre-paid to Coe the rental of the Switch Engine by virtue of the monies paid and property transferred to Railmark at the closing of the Acquisition Agreement, as amended, a substantial portion of which was subsequently transferred and conveyed by Railmark to Coe. However, by its terms, this lease terminated on January 8, 2011, and since that time, a Railmark subsidiary has been purchasing the Switch Engine under contract with Coe for the use and benefit of RFS. This constituted an additional cost to RFS for providing service to APT. Such cost would exist regardless of whether service to APT is provided by RFS on behalf of MAL Railway or provided directly by MAL Railway.

- ◆ Regular maintenance on the Line and track rehabilitation are the responsibility of MAL Railway. MAL Railway also is responsible for track and signal repair and maintenance in accordance with the FRA's requirements. However, RFS is responsible for emergency maintenance and repairs necessary to place the Line in a condition so that service can be provided to APT. Such emergency maintenance includes replacement of broken bars and bolts, repair of washouts and other similar maintenance necessary to the continuance of service to APT. In addition, RFS is responsible for compliance with the provisions of 49 CFR Part 200 to Part

299. These federal regulations require Railmark to obtain locomotive engineer certification, establish drug and alcohol programs, comply with locomotive and railcar safety standards, provide monthly incident reporting and engage in other practices necessary to comply with these regulations. In addition, under direction of MAL Railway, RFS conducts signal inspection and maintenance.

- ◆ RFS is responsible for maintenance of the Switch Engine and is responsible for the costs of the Switch Engine's operation, including costs of fuel and lubricants. These responsibilities must account for fluctuating seasonal costs, such as winter expenses for maintaining the engine at a temperature that will permit it to start during extremely cold temperatures.

Compliance with 49 USC § 10902.

I am aware that the Board, in its Decision of May 18, 2011 ("May 18th Decision") in this docket, expressed concern as to whether RFS was holding itself out as a common carrier, and whether it should have filed a notice of exemption under 49 USC § 10902. I am not a lawyer, so I will not attempt a determination of the applicability of 49 USC § 10902 to RFS. MAL Railway's legal counsel will address that issue in a Response to the May 18th Decision. However, suffice it to say that MAL Railway has not conveyed, transferred or leased any portion of the Line to RFS. Nor has it granted trackage rights to enable RFS to provide rail freight service to APT. And MAL Railway has not ceded to RFS any of MAL Railway's common carrier authority. None of those measures was necessary, because RFS is nothing more than a contract operator serving as MAL Railway's agent in providing rail freight service to APT.

i ■


I also would note that, in Mr. Brown's Affidavit (Exhibit 3), he states that he has never represented to anyone that RFS is a rail common carrier. I do not believe that RFS acting as a contract operator to provide service to APT has misrepresented this situation to the public. The Reply and Objection filed by APT in this docket clearly reflects that the relationship of MAL Railway and RFS certainly has not caused any confusion to APT.

[THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

VERIFICATION

I, R. Robert Butler, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on June 2, 2011



R. Robert Butler, President

Michigan Air-Line Railway Co.

AGREEMENT

THIS AGREEMENT ("Agreement") is made and entered into as of the 8th day of October, 2009, by and among Browner Turnout Co. ("Browner"), Railmark Holdings, Inc. ("Railmark"), Michigan Air-Line Railway Co. ("MAL Railway"), B. Allen Brown ("Brown") and Laurence I. Coe ("Coe").

WITNESSETH:

WHEREAS, MAL Railway (f/k/a Coe Rail, Inc.) is a wholly-owned subsidiary of Railmark; and

WHEREAS, MAL Railway is the owner of approximately 8.42 miles of railroad right-of-way, including rail, ties, track structures and other track materials, extending from West Bloomfield, Michigan, to Wixom, Michigan ("Property"), the legal description of which is set forth on Exhibit A attached hereto; and

WHEREAS, Railmark has borrowed moneys from CIT Group, and Coe Rail, Inc. (now known as MAL Railway) granted a mortgage and security interests on the Property to CIT Group to secure the indebtedness ("Indebtedness") of Railmark and its subsidiaries to CIT Group; and

7 •

WHEREAS, Browner desires to acquire the Property through ownership of MAL Railway, and on the condition that this Agreement is executed, Browner has offered to CIT Group to purchase the Indebtedness; and

WHEREAS, Railmark has offered to convey to Browner all of the stock in MAL Railway on certain terms and conditions, including the release of Railmark and its subsidiaries from the Indebtedness;

NOW, THEREFORE, in consideration of the mutual covenants, promises and agreements contained herein, and the sums to be paid pursuant to this Agreement, the parties agree as follows:

1. **Definitions.** As used in this Agreement, the following words and phrases shall have the meanings respectively ascribed to them herein:

(a) "Closing" shall mean the time when the conditions precedent to the closing of the transactions contemplated by this Agreement, the exchange of relevant documents and the disbursement of sums, as provided in Section 2 of this Agreement, have all been completed.

(b) "Closing Date" shall mean November 2, 2009, or such other date prior thereto as shall be agreed upon by the parties.

(c) "Closing and Escrow Agent" shall mean First American Title Insurance Company, Commercial Division, 100 Bloomfield Hills Parkway, Suite 195, Bloomfield Hills, Michigan 48304.

(d) "Effective Date" means the date on which this Agreement takes effect and is in force, which shall be the date first above written.

(e) "Escrow Agreement" shall mean an agreement substantially in the form of the agreement attached hereto as Exhibit B.

(f) "Escrowed Amount" means the sum of \$277,261.57, which Browner agrees to deposit in escrow on the Effective Date, in the care and custody of the Closing and Escrow Agent, in consideration of the Railmark's commitment to transfer and convey to Browner all of the capital stock of MAL Railway owned by Railmark.

(g) "Lienholders" means the following persons and/or entities which, on the Effective Date, are owed money by Railmark in the amounts indicated, some of which have filed of record liens against Railmark's property:

2. **Closing.** At Closing:

(a) MAL Railway shall convey and transfer to Railmark all of MAL Railway's rights, title and interest in and to the Rolling Stock and Equipment listed in Exhibit C to this Agreement, pursuant to a Bill of Sale, which is substantially in the form attached hereto as Exhibit D, and MAL Railway shall pay over to Railmark all of MAL Railway's cash on hand

on the Closing Date and shall transfer and assign to Railmark all of MAL Railway's accounts receivable as of the Closing Date.

(b) Thereafter, Railmark shall transfer to Browner all of the stock it owns in MAL Railway

(c) After Railmark has transferred to Browner all of MAL Railway's capital stock owned by Railmark, the Closing and Escrow Agent shall disburse the Escrowed Amount, as follows:

(1) First, moneys shall be disbursed by check to each of the Lienholders, payable in the appropriate amount indicated in Section 1(g), and said checks shall be delivered to Brown, who shall be responsible for presenting the checkes to the Lienholders and obtaining from the Lienholders releases of Railmark's indebtedness to the Lienholders and, where necessary, filing said releases of record and obtaining copies thereof which have been stamped to show their filing; and

(2) Upon Brown's delivery to Browner of the releases executed by the Lienholders, including, where necessary, copies of the releases which have been stamped to show their filing of record, Browner shall instruct the Closing and Escrow Agent to do a final record check to determine whether there are any previously undiscovered liens, mortgages or other encumbrances on the Property or the Rolling Stock and Equipment. If no such liens, mortgages or encumbrances are discovered, the Closing and Escrow Agent shall be instructed by Browner to disburse to Railmark the balance of the Escrowed Amount. However, if any such liens, mortgages or encumbrances are discovered, the Closing and Escrow Agent shall

discharge them by payments from the balance of the Escrowed Amount and obtain releases therefore, filing and/or recording such releases where necessary. When the releases are obtained and, if necessary, filed and/or recorded, Browner shall instruct the Closing and Escrow Agent to disburse to Railmark the remaining balance of the Escrowed Amount.

(d) After Railmark has transferred MAL Railway's stock to Browner, as provided in Subsection (b):

(1) Browner shall release Railmark, all of its subsidiary corporations and their respective officers and directors from any liability for the Indebtedness. Such release shall be substantially in the form of the Release attached hereto as Exhibit E. In addition, Browner shall execute and file such documents as are necessary to release any and all security interests in and to the Rolling Stock and Equipment identified in Exhibit C.

(2) Railmark shall convey to MAL Railway marketable title to the real property identified as being owned by Railmark on Exhibit A, free and clear of all liens and encumbrances.

(e) Railmark shall assume liability for all of MAL Railway's accounts payable as of the Closing Date, and thereafter, in the normal course of business, Railmark shall pay and discharge said accounts payable. For the purposes of this subsection (f), the term "accounts payable" shall not include those accounts payable discharged pursuant to the disbursement of the Escrowed Amount, as provided in subsection (c)(1) of this Section 2.

3. **Use of Rolling Stock and Equipment After Closing.** (a) At Closing, after Railmark has transferred MAL Railway's stock to Browner, as provided in Section 2(b), and after the Escrowed Amount has been disbursed, as provided in Section 2(c), MAL Railway shall grant trackage rights to Railmark, at no cost to Railmark, to permit Railmark or its subsidiary designee to continue operation of the dinner train, until January 10, 2010. In consideration thereof, Railmark agrees to operate on and after the Closing Date until January 10, 2010, at no cost to MAL Railway, such of the Rolling Stock and Equipment transferred and conveyed to Railmark at Closing as may be necessary and in such manner as is required to satisfy MAL Railway's common carrier obligation to provide rail service to American Plastics, which the parties agree is the only customer of MAL Railway on the Effective Date. Further, on and after January 10, 2010, Coe, as the assignee of Railmark, agrees to lease to MAL Railway, at no cost to MAL Railway, EMD Switcher #1512 for such time as MAL Railway may require, but not longer than until January 10, 2011.

(b) In recognition that, immediately prior to the Closing Date, all Rolling Stock and Equipment were owned by MAL Railway, a wholly-owned subsidiary of Railmark, Railmark shall defend in the name of MAL Railway and/or Browner, and will indemnify and save MAL Railway and/or Browner harmless from and against any claim, act, suit, proceeding or demand made, taken or asserted against MAL Railway and/or Browner by any and every person, firm or corporation claiming any estate, right, title or interest in or to the Rolling Stock and/or Equipment by reason of any matter or thing, regardless of whether it arises prior to or after the Closing Date.

(c) In further recognition that the Rolling Stock and Equipment were owned by MAL Railway, a Railmark subsidiary, immediately prior to the Closing Date: RAILMARK AGREES THAT THE ROLLING STOCK AND EQUIPMENT SHALL BE TRANSFERRED AND CONVEYED BY MAL RAILWAY TO RAILMARK "AS IS" WITHOUT ANY OTHER REPRESENTATIONS AND WARRANTIES, WHETHER WRITTEN, ORAL OR IMPLIED, AND MAL RAILWAY SHALL NOT, BY VIRTUE OF HAVING TRANSFERRED AND CONVEYED THE ROLLING STOCK AND EQUIPMENT, BE DEEMED TO HAVE MADE ANY REPRESENTATION OR WARRANTY AS TO THE MERCHANTABILITY, FITNESS, OPERABILITY, DESIGN OR CONDITION OF, OR AS TO THE QUALITY OF THE MATERIAL OR WORKMANSHIP IN THE ROLLING STOCK AND EQUIPMENT FOR A PARTICULAR USE.

(d) The Rolling Stock and Equipment shall be delivered to Railmark at a location on the Property mutually agreed upon by Railmark and MAL Railway, and at a mutually agreed upon time, subject to the provisions of Section 7 of this Agreement regarding the storage of Rolling Stock and Equipment.

(e) As soon as practicable after delivery of the Rolling Stock to Railmark, Railmark shall arrange to have the Rolling Stock re-stenciled with reporting marks provided by Railmark. After the Rolling Stock is delivered to Railmark, and with Browner's full cooperation, Railmark shall complete transfers of UMLER data on the Rolling Stock.

4. **Operation of MAL Railway Prior to Closing Date.** Subsequent to the Effective Date and prior to the Closing Date, MAL Railway shall continue its railroad operations in such manner as will comply with its common carrier obligations. Brown and Railmark agree to use their collective best efforts to ensure that, during said period of time, there shall be no interruption of service that would cause MAL Railway to fail to comply with its common carrier obligations. At the time this Agreement is executed, MAL Railway shall deliver to Browner a certificate evidencing that MAL Railway has insurance coverage which satisfies the insurance requirements of the STB, and that the premium or premiums on such policy or policies of insurance have been paid to a date on or after January 10, 2010.

5. **Representations and Warranties.** (a) Railmark hereby represents and warrants that:

(1) It is a corporation organized and existing in good standing under the laws of the State of Michigan, and it has the following wholly-owned subsidiary corporations, in addition to MAL Railway: Rail Freight Solutions, Inc. and Railmark Track Works, Inc.;

(2) It is the sole owner of all of the capital stock of MAL Railway, and after the release of Railmark and its subsidiaries from the Indebtedness at Closing, as provided in Section 2(d)(1) of this Agreement, said capital stock will be free and clear of any liens, encumbrances, pledges, security interests and claims of any kind;

(3) Railmark has the full right and authority to transfer and deliver the capital stock of MAL Railway owned by Railmark, without the consent or approval of any

other person or entity and without complying with the terms of any transfer restrictions in MAL Railway's organizational documents;

(4) No other contracts exist for the sale or transfer of the capital stock of MAL Railway to be transferred to Browner by Railmark;

(5) The delivery of the duly endorsed certificates for the capital stock of MAL Railway will, upon the Closing Date, transfer valid title to said stock to Browner; and

(6) It is not a party to any contract, lease or other agreement or subject to any judgment, decree or order, which does or may materially and adversely affect the transactions contemplated by this Agreement.

(b) Browner hereby represents and warrants that:

(1) It is a corporation organized and existing in good standing under the laws of the State of Nebraska;

(2) It has the full right and authority to enter into this Agreement;

(3) The capital stock of MAL Railway is being acquired for investment for Browner's own account and not with a view to offering it for sale or otherwise distributing it, after or in connection with the transfer to it; and

(4) Browner has been given full opportunity to ask questions and receive answers concerning said stock, the Property, the past and future operations and prospects of MAL Railway and the sale of said stock, pursuant to the terms hereof.

(c) MAL Railway hereby represents and warrants that:

(1) It was organized under the laws of the State of Michigan as Coe Rail, Inc., but the name of said corporation was changed to Michigan Air-Line Railway Co. on June 28, 2006;

(2) It continues to exist in good standing under the laws of the State of Michigan;

(3) All of its authorized, issued and outstanding stock is owned by Railmark;

(4) Railmark has the full right and authority to transfer and deliver the capital stock of MAL Railway owned by Railmark, without complying with the terms of any transfer restrictions in MAL Railway's organizational documents or established by resolution of the Board of Directors of MAL Railway;

(5) No other contracts exist for the sale or transfer of the capital stock of MAL Railway being transferred to Browner, and no agreement or commitment for the issuance of additional MAL Railway capital stock has been made;

(6) The officers and directors of MAL Railway are as listed on Exhibit F attached hereto;

(7) None of its employees are members of a union, and none of its employees are employed pursuant to a written contract which would preclude termination of such employee on and as of the Closing Date;

(8) It is not a party to any contract, lease or other agreement or subject to any judgment, decree or order, which does or may materially and adversely affect the transactions contemplated by this Agreement; and

(9) It is not in default under any commitment, contract, agreement, lease or other document to which it is a party, except for the documents embodying the Indebtedness, and no event has occurred which, with the giving of notice or lapse of time, or both, would constitute a default thereunder.

(d) Brown hereby represents and warrants that:

(1) He is the owner of 51% of the capital stock of Railmark;

(2) He approves of Railmark's conveyance and transfer of all of the stock of MAL Railway owned by Railmark, pursuant to the terms and provisions of this Agreement;

(3) He is the President of Railmark and the President of MAL Railway; and

(4) As the President of MAL Railway, he has disclosed to Browner all contracts, agreements and commitments made or entered into by MAL Railway that will survive the Closing.

(e) Coe hereby represents and warrants that:

(1) He is the owner of 49% of the capital stock of Railmark; and

(2) He approves of Railmark's conveyance and transfer of all of the stock of MAL Railway owned by Railmark, pursuant to the terms and provisions of this Agreement.

(f) Each party represents and warrants to the other that he or it is duly authorized to execute and deliver this Agreement and to perform its obligations under this Agreement.

(g) The representations and warranties made by each of the parties herein shall be true and correct on and as of the Closing Date with the same effect as though such representations and warranties had been made or given on and as of the Closing Date.

6. **Storage of Rolling Stock and Equipment.** After the transfer of the Rolling Stock and equipment by Browner to Railmark at Closing, Railmark and/or its transferee shall be permitted to store any or all of the Rolling Stock and equipment on the Property until the end of 30 days after the abandonment of MAL Railway's rail line has been approved by the

STB. If any of the Rolling Stock is not removed within that time, a daily storage charge shall be imposed on each item of Rolling Stock remaining on the Property after the 30-day period.

7. **MAL Railway's Employees.** The officers and directors of MAL Railway shall be responsible for terminating the employment of all of MAL Railway's employees on and as of the Closing Date.

8. **Abandonment of MAL Railway's Operating Authority.** Coe, Brown and Railmark agree to use their best collective efforts to assist Browner in achieving the abandonment of MAL Railway's rail line.

9. **Entire Agreement.** This Agreement and the attached Exhibits, which shall be and are hereby fully incorporated in this Agreement, contain the entire understanding and agreement of the parties and may be altered or amended only by a document in writing signed by all parties.

10. **Binding Effect.** This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective heirs, executors, personal representatives, successors and assigns, and to the benefit of no other party.

11. **Governing Law.** The construction and interpretation of this Agreement shall at all times and in all respects be governed by the laws of the State of Michigan, notwithstanding any laws, rules or principles to the contrary.

12. Section Headings. The headings of the sections of this Agreement are for reference only and not to limit, expand or otherwise affect the contents of this Agreement.

13. Counterparts. This Agreement may be signed in counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth opposite their respective signatures below, but effective as of the day first above written.

BROWN R. TURNOUT CO.


R. Robert Butler, President

DATE: 10/8/09

RAILMARK HOLDINGS, INC.

B. Allen Brown, President

DATE: _____

MICHIGAN AIR-LINE RAILWAY CO.

B. Allen Brown, President

DATE: _____

B. Allen Brown

DATE: _____

Laurence I. Coc

DATE: _____

12. Section Headings. The headings of the sections of this Agreement are for reference only and not to limit, expand or otherwise affect the contents of this Agreement.

13. Counterparts. This Agreement may be signed in counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates set forth opposite their respective signatures below, but effective as of the day first above written.

BROWNER TURNOUT CO.

R. Robert Butler, President

DATE: _____

RAILMARK HOLDINGS, INC.



B. Allen Brown, President

DATE: 10/08/09

MICHIGAN AIR-LINE RAILWAY CO.



B. Allen Brown, President

DATE: 10/08/09



B. Allen Brown

DATE: 10/08/09



Laurence I. Coe

DATE: 10/08/09

AMENDMENT TO AGREEMENT

THIS AMENDMENT TO AGREEMENT ("Amendment") is made and entered into as of the 15th day of October, 2009, by and among Browner Turnout Co. ("Browner"), Railmark Holdings, Inc. ("Railmark"), Michigan Air-Line Railway Co. ("MAL Railway"), B. Allen Brown ("Brown") and Laurence I. Coe ("Coe").

WITNESSETH:

WHEREAS, the parties entered into that certain agreement ("Agreement") dated as of the 8th day of October, 2009; and

WHEREAS, the parties have agreed that certain changes in the Agreement are necessary and appropriate; and

WHEREAS, the parties have determined to reduce to writing in this Amendment the various changes needed in the Agreement;

NOW, THEREFORE, in consideration of the mutual covenants, promises and agreements contained in this Amendment, the parties agree to amend the Agreement as follows:

1. **Amendment of Section 1 of Agreement.** Section 1 of the Agreement shall be and is hereby amended to read in its entirety, as follows:

1. **Definitions.** As used in this Agreement, the following words and phrases shall have the meanings respectively ascribed to them herein:

(a) "Closing" shall mean the time when the conditions precedent to the closing of the transactions contemplated by this Agreement, the exchange of relevant documents and the disbursement of sums, as provided in Section 2 of this Agreement, have all been completed.

(b) "Closing Date" shall mean November 2, 2009, or such other date prior thereto as shall be agreed upon by the parties.

(c) "Escrow Agent" shall mean the law firm of Alderson, Alderson, Weiler, Conklin, Burghart & Crow, L.L.C., 2101 SW 21st Street, Topeka, Kansas 66604.

(d) "Effective Date" means the date on which this Agreement takes effect and is in force, which shall be the date first above written.

(e) "Escrow Agreement" shall mean an agreement substantially in the form of the agreement attached hereto as Revised Exhibit B.

(f) "Escrowed Amount" means the sum of \$277,261.57, which Browner agrees to transfer to the Escrow Agent's Trust Account as soon after the Effective Date as possible, in the care and custody of the Escrow Agent, in consideration of Railmark's commitment to transfer and convey to Browner all of the capital stock of MAL Railway owned by Railmark.

(g) "Lienholders" means the following persons and/or entities which, on the Effective Date, are owed money by Railmark in the amounts indicated, some of which have filed of record liens against the Property and/or Railmark's property: U.S. Internal Revenue Service (\$26,681.29); State of Michigan (\$22,080.28); National Signal Maintenance (\$4,500.00); Railtech (\$9,000.00); and Robert Schellig (\$15,000).

2. **Amendment of Section 2 of Agreement.** Section 2 of the Agreement shall be and is hereby amended to read in its entirety, as follows:

2. **Closing.** As soon after the Effective Date as practicable, Brown shall provide to the Escrow Agent the payoff amount, as of a subsequent date certain, for the moneys owed to each of the Lienholders. After the Escrow Agent has received said payoff amounts, the Escrow Agent shall disburse by check to each of the Lienholders, payable in the payoff amount for each Lienholder, and said checks shall be delivered to Brown, who shall be responsible for presenting the checks to the Lienholders and obtaining from the Lienholders releases of Railmark's indebtedness to the Lienholders and, where necessary, filing said releases of record and obtaining copies thereof which have been date stamped to show their filing. After all of the releases have been furnished to the Escrow Agent, the parties shall agree upon a Closing Date and proceed to Closing on that date. At Closing:

(a) MAL Railway shall convey and transfer to Railmark all of MAL Railway's rights, title and interest in and to the Rolling Stock and Equipment listed in Exhibit C to this Agreement, pursuant to a Bill of Sale, which is substantially in the form attached hereto as Exhibit D, and MAL Railway shall pay over to Railmark all of MAL Railway's cash on hand on the Closing Date and shall transfer and assign to Railmark all of MAL Railway's accounts receivable as of the Closing Date.

(b) Thereafter, Railmark shall transfer to Browner all of the stock it owns in MAL Railway, by providing to Browner duly endorsed stock certificates evidencing all of the issued and outstanding stock of MAL Railway. Concurrently therewith, Brown, as President of MAL Railway, shall deliver to Browner all of MAL Railway's corporate books and records, including minutes of Board of Directors and shareholders' meetings, organizational documents and contracts which will survive the Closing, and also all of the corporate books of account.

(c) After Railmark has transferred to Browner all of MAL Railway's capital stock owned by Railmark, Browner shall obtain a final record check, to determine whether there are any previously undiscovered liens, mortgages or other encumbrances on the Property or the Rolling Stock and Equipment. If no such liens, mortgages or encumbrances are discovered within two weeks of the date when Railmark transfers all of MAL Railway's stock to Browner, the Escrow Agent shall be instructed by Browner to disburse to Railmark the balance of the Escrowed Amount. However, if any such liens, mortgages or encumbrances are discovered, the Escrow Agent shall discharge them by payments from the balance of the Escrowed Amount and obtain releases therefor, filing and/or recording such releases where necessary. When the releases are obtained and, if necessary, filed and/or recorded, Browner shall instruct the Escrow Agent to disburse to Railmark the remaining balance of the Escrowed Amount.

(d) After Railmark has transferred MAL Railway's stock to Browner, as provided in Subsection (b):

(1) Browner shall release Railmark, all of its subsidiary corporations and their respective officers and directors from any liability for the Indebtedness. Such release shall be substantially in the form of the Release attached hereto as Exhibit E. In addition, Browner shall execute and file such documents as are necessary to release any and all security interests in and to the Rolling Stock and Equipment identified in Exhibit C.

(2) Railmark shall convey to MAL Railway marketable title to the real property identified as being owned by Railmark on Exhibit A, free and clear of all liens and encumbrances.

(e) Railmark shall assume liability for all of MAL Railway's accounts payable as of the Closing Date, and thereafter, in the normal course of business, Railmark shall pay and discharge said accounts payable. For the purposes of this

subsection (f), the term "accounts payable" shall not include those accounts payable to the Lienholders which are to be discharged pursuant to this Section 2.

3. **Amendment of Section 3(a) of Agreement.** Subsection (a) of Section 3 of the Agreement shall be and is hereby amended to read in its entirety, as follows:

(a) At Closing, after Railmark has transferred MAL Railway's stock to Browner, as provided in Section 2(b), and after the Escrowed Amount has been disbursed, as provided in Section 2(c), MAL Railway shall grant trackage rights to Railmark, at no cost to Railmark, to permit Railmark or its subsidiary designee to continue operation of the dinner train, until January 8, 2010. In consideration thereof, Railmark agrees to operate on and after the Closing Date until January 8, 2010, at no cost to MAL Railway, such of the Rolling Stock and Equipment transferred and conveyed to Railmark at Closing as may be necessary and in such manner as is required to satisfy MAL Railway's common carrier obligation to provide rail service to American Plastics, which the parties agree is the only customer of MAL Railway on the Effective Date. The parties agree that the foregoing shall be sufficient to grant trackage rights to Railmark and to vest Railmark with authority to perform MAL Railway's common carrier obligations and that no formal agreements shall be required for such purposes. Further, on and after January 8, 2010, Coe, as the assignee of Railmark, agrees to lease to MAL Railway, at no cost to MAL Railway, EMD Switcher #1512 for such time as MAL Railway may require, but not longer than until January 8, 2011.

4. **Amendment of Section 4 of Agreement.** Section 4 of the Agreement shall be and is hereby amended to read in its entirety, as follows:

4. **Operation of MAL Railway Prior to Closing Date.** Subsequent to the Effective Date and prior to the Closing Date, MAL Railway shall continue its railroad operations in such manner as will comply with its common carrier obligations. Brown and Railmark agree to use their collective best efforts to ensure that, during said period of time, there shall be no interruption of service that would cause MAL Railway to fail to comply with its common carrier obligations. At the time this Agreement is executed, MAL Railway shall deliver to Browner a certificate evidencing that MAL Railway has insurance coverage which satisfies the insurance requirements of the STB, and that the premium or premiums on such policy or policies of insurance have been paid to a date on or after January 8, 2010.

5. **Agreement Otherwise in Effect.** Except as specifically amended hereby, the Agreement shall remain in force and effect as originally executed by the parties.

6. Counterparts. This Amendment may be signed in counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Amendment on the dates set forth opposite their respective signatures below, but effective as of the day first above written.


BROWNER TURNOUT CO.

R. Robert Butler, President

DATE: 10/15/09

RAILMARK HOLDINGS, INC.

B. Allen Brown, President

DATE: _____

MICHIGAN AIR-LINE RAILWAY CO.

B. Allen Brown, President

DATE: _____

B. Allen Brown

DATE: _____

Laurence I. Coe

DATE: _____

6. Counterparts. This Amendment may be signed in counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Amendment on the dates set forth opposite their respective signatures below, but effective as of the day first above written.

BROWNER TURNOUT CO.

R. Robert Butler, President

DATE: _____

RAILMARK HOLDINGS, INC.



B. Allen Brown, President

DATE: 10/16/09

MICHIGAN AIR-LINE RAILWAY CO.



B. Allen Brown, President

DATE: 10/16/09



B. Allen Brown

DATE: 10/16/09

Laurence I. Coe

DATE: _____

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6. Counterparts. This Amendment may be signed in counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Amendment on the dates set forth opposite their respective signatures below, but effective as of the day first above written.

BROWNER TURNOUT CO.

R. Robert Butler, President

DATE: _____

RAILMARK HOLDINGS, INC.

B. Allen Brown, President

DATE: _____

MICHIGAN AIR-LINE RAILWAY CO.

B. Allen Brown, President

DATE: _____

B. Allen Brown

DATE: _____

Laurence I. Coe

DATE: Oct 15 / 09

STATE OF MICHIGAN)
) ss:
COUNTY OF OAKLAND)

AFFIDAVIT OF B. ALLEN BROWN

B. Allen Brown, of lawful age, being first duly sworn, deposes and states as follows:

1. Affiant is the sole shareholder, President and CEO of Railmark Holdings, Inc. ("Railmark").
2. On June 2, 2006, Railmark purchased Coe Rail, Inc., and later that month, on June 28, 2006, changed the railroad's name to Michigan Air-Line Railway Co. ("MAL Railway").
3. In November of 2009, Browner Turnout Co. acquired ownership of MAL Railway. Since MAL Railway had provided rail common carrier freight service to American Plastic Toys, Inc. ("APT") since 2006 under Railmark's ownership, as part of the transaction whereby Browner Turnout acquired ownership of MAL Railway, it was agreed that Rail Freight Solutions, Inc. ("RFS"), a wholly-owned subsidiary of Railmark would continue serving APT as MAL Railway's agent.
4. MAL Railway has provided freight service to APT from the time Railmark acquired the railroad from Coe Rail, Inc. in 2006. APT is now the sole shipper on MAL Railway's line in Oakland County, Michigan, and it has been the sole shipper on this line since the middle of 2008.
5. Affiant has reviewed the Verified Statement of R. Robert Butler prepared in response to the decision of the Board in STB Docket AB-1053 (Sub-No. 1X), dated May 18, 2011. Affiant also has reviewed that decision and recognizes his obligation to provide an explanation to the Board regarding the services provided by RFS to APT. To that end,



Affiant agrees with the description of the current arrangement between RFS and MAL Railway, as presented by Mr. Butler in his Verified Statement, and Affiant has agreed that his Affidavit may be attached as an exhibit to Mr. Butler's Verified Statement, to express his concurrence with Mr. Butler's statement. However, Affiant believes that the following additional statements should be presented to the Board.

6. With respect to the rates charged to APT, it was necessary for Affiant to advise APT of the necessity of increasing rates shortly after Railmark became the owner of MAL Railway in 2006. At that time, the historical rate of \$200 per car was raised to \$350. In 2007, the per car rate was increased to \$500, and in 2008, the rate was increased to \$1,500 per railcar. These increases were made long prior to Browner Turnout's acquisition of MAL Railway.

7. On December 31, 2009, it was necessary for Railmark to terminate its dinner train operations, leaving the freight service to APT as the only traffic on MAL Railway's line and the only revenue source to RFS. Prior to that time, MAL Railway had been able to use the revenue derived from the dinner train operation to subsidize the rail freight service by RFS to APT. Without the dinner train operations, the revenues derived solely from the freight service provided APT by RFS were insufficient to cover the costs of such service. Thus, on January 14, 2010, Affiant wrote to Jim Grau, APT's CFO, advising him of the necessity of establishing a monthly rate of \$6,500, regardless of the number of cars moved by RFS during that month.

8. As Mr. Butler indicated in his Verified Statement, it was necessary for RFS to establish a monthly rate rather than a per carload rate, because there are some months where APT does not request any service at all from RFS, and in other months there are only one or two requests for car movement; yet, RFS's fixed costs remained. Going to a monthly rate

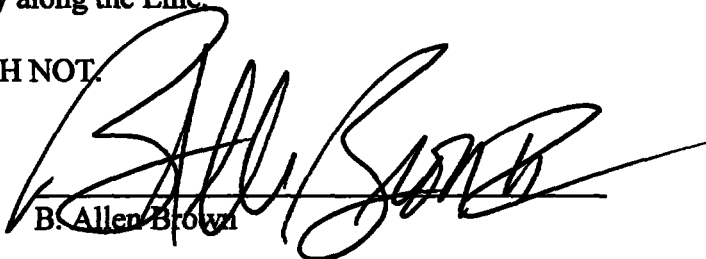


enabled RFS to cover its fixed costs and seasonal expenses, regardless of the amount of inbound traffic.

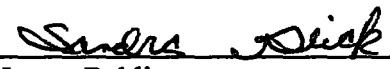
9. Mr. Butler's Verified Statement also addressed the representations of RFS as to its relationship with MAL Railway. Affiant hereby states that he has never represented to anyone that Railmark or RFS is a rail common carrier. Affiant has never represented that RFS is anything other than a contractor to MAL Railway, having the responsibility to provide rail freight service to APT for and on behalf of MAL Railway as its agent.

10. Since the time when APT became the sole shipper on the Line in early 2008, Affiant is not aware of any legitimate request for rail freight service by MAL Railway, Railmark or RFS from any person or entity along the Line.

AND FURTHER AFFIANT SAITH NOT.


B. Allen Brown

Subscribed and sworn to before me, the undersigned notary public in and for the state and county aforesaid, on this 1 day of June, 2011.


Notary Public

My Appointment Expires:

September 8, 2013

(SEAL)



**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB DOCKET NO. AB-1053 (Sub-No. 1X)

**MICHIGAN AIR-LINE RAILWAY CO.
- ABANDONMENT AND DISCONTINUANCE OF SERVICE EXEMPTION -
LINE IN OAKLAND COUNTY, MICHIGAN**

RESPONSE TO STB'S DECISION OF MAY 18, 2011

EXHIBIT B

CERTIFICATES OF SERVICE

**ALDERSON, ALDERSON, WEILER,
CONKLIN, BURGHART & CROW, L.L.C.**
ATTORNEYS AT LAW

FILE

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JARED R. MUIR

***LL.M., TAXATION**
****LICENSED TO PRACTICE IN**
KANSAS AND MISSOURI

May 23, 2011

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20423-0001

Re: STB Docket No. AB-1053 (Sub-No. 1X), Michigan
Air-Line Railway Co.-Abandonment Exemption-
Line in Oakland County, Michigan

Dear Ms. Brown:

As required by the decision of the Surface Transportation Board filed on May 18, 2011, in the above-referenced docket, I have served copies of that decision on Troy R. Taylor, attorney for American Plastic Toys, Inc., and B. Allen Brown, President of Railmark Holdings, Inc., d/b/a Rail Freight Solutions. Enclosed are the original and 10 copies of a Certificate of Service testifying to such service.

Also enclosed is an additional copy of the Certificate of Service, and I would request that you date-stamp that copy and return it to me in the self-addressed, stamped envelope I have enclosed.

Thank you for your assistance in this matter.

Very truly yours,

W. Robert Alderson
ALDERSON, ALDERSON, WEILER,
CONKLIN, BURGHART & CROW, L.L.C.

WRA:bjb
Enclosures
cc: R. Robert Butler
Dirk H. Beckwith, Esq.

FILE

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB DOCKET NO. AB-1053 (Sub-No. 1X)

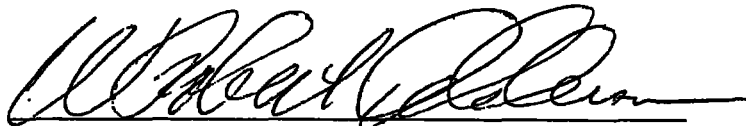
**MICHIGAN AIR-LINE RAILWAY CO.
- ABANDONMENT AND DISCONTINUANCE OF SERVICE EXEMPTION -
LINE IN OAKLAND COUNTY, MICHIGAN**

**CERTIFICATE OF SERVICE
OF SURFACE TRANSPORTATION BOARD'S DECISION OF
MAY 18, 2011**

The undersigned hereby certifies that, in accordance with the requirement of the Surface Transportation Board in its decision filed on May 18, 2011, in the above-captioned docket, copies of that decision were mailed via first-class mail, postage prepaid, on May 20, 2011, to the following persons:

B. Allen Brown, President
Railmark Holdings, Inc.,
d/b/a Rail Freight Solutions
840 N. Pontiac Trail
Walled Lake, Michigan 48390

Troy R. Taylor
Law Office of Troy R. Taylor, PLLC
107 E. Main Street, Suite 204
Northville, Michigan 48167



W. Robert Alderson
ALDERSON, ALDERSON, WEILER,
CONKLIN, BURGHART & CROW, L.L.C.
2101 S.W. 21st Street
Topeka, Kansas 66604
(785) 232-0753
Attorney for Michigan Air-Line Railway Co.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 3rd day of June, 2011, the above and foregoing Response to STB's Decision of May 18, 2011, was deposited in the U.S. Mail, first-class postage prepaid, addressed to the following persons:

B. Allen Brown, President
Rail Freight Solutions, Inc.
840 N. Pontiac Trail
Walled Lake, Michigan 48390

Troy R. Taylor
Law Office of Troy R. Taylor, PLLC
107 E. Main Street, Suite 204
Northville, Michigan 48167

A handwritten signature in black ink, appearing to read "W. Robert Alderson", is written over a horizontal line.

W. Robert Alderson, No. 6629
ALDERSON, ALDERSON, WEILER,
CONKLIN, BURGHART & CROW, L.L.C.
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Topeka, Kansas 66604
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Attorney for Michigan Air-Line Railway Co.